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COURT OF APPEALS

CRIMINAL LAW.

COUNTY COURT PROPERLY RELIED ON THE RESULTS OF A HEARING BEFORE A JUDICIAL HEARING OFFICER TO DETERMINE AMOUNT OF RESTITUTION.

The Court of Appeals, in a full-fledged opinion by Judge Stein, held County Court properly relied upon the results of a hearing conducted by a judicial hearing officer (JHO) to determine the amount of restitution to be paid by the defendant. The defendant was given the opportunity to submit additional evidence to County Court: "While Penal Law § 60.27 (2) 'emphatically advises that it is "the court" . . . which is to conduct any hearing thought necessary for this purpose' . . . , the court is 'not . . . restricted to reliance upon only competent evidence' (*Kim*, 91 NY2d at 411). Rather, CPL 400.30 'embodies a liberal evidentiary standard' . . . and provides that '*[a]ny* relevant evidence, not legally privileged, may be received regardless of its admissibility under the exclusionary rules of evidence' (CPL 400.30 [4] [emphasis added]). That is, even where 'the record does not contain sufficient evidence to support such finding [of the actual amount of loss]' or the defendant has requested a hearing (Penal Law § 60.27 [2]), nothing in the statutory text requires a formal evidentiary hearing. Rather, as noted, this Court has characterized the hearing as 'a reasonable opportunity [for the defendant] to contest the People's evidence or supply evidence on his [or her] own behalf'...". ***People v. Connolly*, 2016 N.Y. Slip Op. 03651, CtApp 5-10-16**

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL NOT INEFFECTIVE FOR FAILING TO SHOW PSYCHIATRIC EXPERT PHOTOS OF VICTIM'S WOUNDS AND FAILING TO INFORM EXPERT OF THE PEOPLE'S REVENGE THEORY.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, reversing the Appellate Division, determined defendant's counsel was not ineffective. Defendant was 15 when he stabbed the 12-year-old victim more than 20 times (the victim survived). The defendant claimed he blacked out and had no memory of the stabbing. The defense called a psychiatrist who testified defendant's mental condition, together with his use of marijuana, made it impossible for the defendant to form the intent to commit the crime. Defense counsel did not show the expert the photos of the victim's wounds and did not inform the expert of the prosecution's theory that the defendant considered the victim a "snitch" and attacked him for that reason: "Whatever the wisdom of counsel's strategy, we cannot say that it was inconsistent with the actions of a reasonably competent attorney. There is no evidence on this record of what information forensic experts ordinarily require in order to arrive at an expert conclusion, or what information the expert requested in this case. Nor is there any evidence of what information an attorney ordinarily would or should provide to such an expert, independently of the expert's request. Therefore, it is not clear that prevailing professional norms would have required counsel to provide the expert with photographs and hospital records of the victim's stab wounds or inform him of the prosecution's theory of the case ...". ***People v. Henderson*, 2016 N.Y. Slip Op. 03649, CtApp 5-10-16**

EMPLOYMENT LAW (PUBLIC EMPLOYEES).

NYS RACING AND WAGERING BOARD HAD THE DISCRETION TO UNILATERALLY REDUCE PER DIEM WAGES OF SEASONAL EMPLOYEES BY 25 PERCENT.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, reversing the Appellate Division, over a dissenting opinion, determined the New York State Racing and Wagering Board had the discretion to reduce the per diem wages of seasonal employees by 25%. The majority held that a Side Letter Agreement, which incorporated 50 articles of the collective bargaining agreement, set limits on the discretionary authority of the racing board, but did not prohibit the discretionary wage reduction at issue here. The dissent argued the 50 incorporated articles did not address the wage reduction and therefore should not be deemed to have given the racing board the discretion to unilaterally reduce the wages of seasonal employees. ***Matter of Kent v. Lefkowitz*, 2016 N.Y. Slip Op. 03650, CtApp 5-10-16**

ENVIRONMENTAL LAW, WATER LAW.

WHETHER ADIRONDACK WATERWAY IS NAVIGABLE IN FACT, AND THEREFORE AVAILABLE FOR PUBLIC USE, COULD NOT BE DETERMINED AS A MATTER OF LAW.

The Court of Appeals held questions of fact precluded summary judgment in an action to determine whether a two-mile system of ponds and streams in a remote area of the Adirondack Mountains is navigable-in-fact. If it is, it is subject to a public right of navigation (by canoe). If it isn't, the adjacent private property owners can prohibit public use: "As a general principle, if a waterway is not navigable-in-fact, 'it is the private property of the adjacent landowner' ... . A waterway that is navigable-in-fact, however, 'is considered a public highway, notwithstanding the fact that its banks and bed are in private hands' ... . To be subject to this public easement, a waterway must provide practical utility to the public as a means for transportation, whether for trade or travel (*Adirondack League Club*, 92 NY2d at 603). In *Adirondack League Club*, though we did 'not broaden the standard for navigability-in-fact,' we held that recreational use may properly be 'part of the navigability analysis' ...". **Friends of Thayer Lake LLC v. *Brown*, 2016 N.Y. Slip Op. 03647, CtApp 5-10-16**

FORECLOSURE, REAL PROPERTY LAW, MORTGAGES, CONDOMINIUMS.

CONSOLIDATED MORTGAGES CONSIDERED FIRST MORTGAGE OF RECORD WITH PRIORITY OVER CONDOMINIUM COMMON CHARGES LIEN.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined a lien for unpaid (condominium) common charges did not take priority over the second of two Citibank mortgages which were consolidated. Plaintiff was the winning bidder in a foreclosure action commenced by the condominium board for unpaid common charges. Plaintiff took the property subject to the "first mortgage of record." Years before the common charges lien two mortgages taken out by the previous condominium owner had been consolidated. Plaintiff argued the second of those two consolidated mortgages should be extinguished by the foreclosure action because, by statute, the lien for the common charges was subject only to the "first mortgage of record." The Court of Appeals held the two consolidated mortgages should be considered the "first mortgage" in this context: "Given the practical realities of this case, . . . the agreement between Citibank and the previous unit owner to consolidate the mortgages 'into a single mortgage lien,' recorded years before the common charges lien, qualifies as 'the first mortgage of record.' To hold otherwise places form over substance. Indeed, the ease with which a formulaic application of the term 'first mortgage of record' can be manipulated demonstrates that such holding would not promote the statutory purpose." ***Plotch v. Citibank*, N.A., 2016 N.Y. Slip Op. 03648, CtApp 5-10-16**

JUDGES

JUDGES NOT ENTITLED TO DAMAGES BASED UPON INADEQUATE COMPENSATION.

The Court of Appeals determined present and retired judges were not entitled to damages based on inadequate compensation during the years legislation considering judicial compensation was improperly linked to unrelated policy initiatives. Although the Court of Appeals struck down the practice, called linkage, as a violation of the separation of powers, the court did not make the finding that judicial compensation was in fact too low during those years. To do so and award damages would intrude on the legislature's budgetary powers: "[W]e suggested that money damages would be an inappropriate form of relief from the State's unconstitutional linkage practice because any mandate that the State pay money damages would, as a practical matter, be tantamount to a directive to increase judicial compensation in a manner that would arrogate the legislative branch's budgetary powers to the judiciary. Thus, we observed that, in fashioning a remedy, 'deference to the Legislature — which possesses the constitutional authority to budget and appropriate — is necessary' . . . and that 'whether judicial compensation should be adjusted, and by how much, is within the province of the Legislature' ...". ***Larabee v. Governor of the State of N.Y.*, 2016 N.Y. Slip Op. 03646, CtApp 5-10-16**

FIRST DEPARTMENT

CRIMINAL LAW, APPEALS.

COMBINED RACIAL-GENDER BIAS IS A PROPER SUBJECT OF A *BATSON* CHALLENGE TO THE REMOVAL OF A JUROR; APPELLATE DIVISION HAS INTEREST OF JUSTICE JURISDICTION TO REVIEW *BATSON* ERRORS.

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, over an extensive dissenting opinion, determined the trial judge's failure follow the protocol for *Batson* challenges to the prosecutor's removal of African-American males from the jury required reversal. Although the issues were preserved, the court noted it had the power to exercise interest of justice jurisdiction over *Batson* issues. The court further held a combined racial/gender bias is the proper subject of a *Batson* challenge: "The wholesale exclusion of black men from the jury gives rise to a mandatory inference of discrimination at the first step of the *Batson* inquiry ... . The prosecutor used peremptory strikes to eliminate black male jurors while not excluding others who expressed skepticism about the credibility of police officers, such as the woman on the first panel who stated that 'sometimes the police [were] not [doing their job],' and 'could be forceful . . . if . . . threatened,' and the woman on the second panel who said she'd 'seen things go both ways' with the police. * * * The court failed to follow the three-

step *Batson* protocol. Although the prosecutor furnished some explanations for the strikes, he gave them only as to Hewitt and Prosser, not Lortey. Even if those explanations were accepted as facially neutral, the court was obliged to continue on to step three and afford defense counsel the opportunity to show that the prosecutor's stated reasons for the strikes were pretextual. Defense counsel was never given the opportunity to argue that the prosecutor's explanations were a pretext for discrimination. The court improperly combined steps and deviated from the *Batson* protocol, which cannot be considered harmless or nonprejudicial to defendant ...". ***People v. Watson*, 2016 N.Y. Slip Op. 03688, 1st Dept 5-10-16**

LANDLORD-TENANT, CONTRACT LAW.

QUESTIONS OF FACT WHETHER TENANT ENTITLED TO RESCIND LEASE BECAUSE CERTIFICATE OF OCCUPANCY PROHIBITED USE OF THE PROPERTY FOR COMMERCIAL PURPOSES.

The First Department, in a full-fledged opinion by Justice Tom, reversing Supreme Court, determined questions of fact precluded the granting of landlord's cross-motion for summary judgment dismissing plaintiff-tenant's rescission action (alleging impossibility, fraud, misrepresentation and frustration of purpose). By the terms of the lease the tenant was prohibited from any use of the premises which violated the certificate of occupancy (CO). The lease required tenant to use the premises solely for a commercial purpose (executive recruiting firm). However, the CO required that the premises be used solely as residential property. The First Department distinguished the line of cases which enforced leases where the only objection to the lease was a problem with the CO: "[T]here are issues of fact as to whether plaintiff's cause of action for rescission can be proved. While the purpose of the lease was for the space to be used as an office and plaintiff is in fact prohibited from any other use, the lease also prohibits plaintiff from using the premises in violation of the CO, and the CO itself prohibits commercial use of the space. Therefore, plaintiff properly raises the excuse of impossibility of performance as its ability to perform under the lease was destroyed by law ... . Absent defendants' willingness to alter the CO it was impossible for plaintiff to perform its obligations under the lease, and the evidence raises an issue of fact as to whether defendants were willing to cooperate in this regard. * * *... [T]here is an issue of fact as to whether the lease should be terminated on the ground of frustration of purpose. In order to invoke this defense, 'the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense'...". ***Jack Kelly Partners LLC v. Zegelstein*, 2016 N.Y. Slip Op. 03820, 1st Dept 5-12-16**

FREEDOM OF INFORMATION LAW (FOIL).

RECORDS OF THE USE OF VANS BY THE NYPD WHICH SCAN BUILDINGS AND VEHICLES FOR EXPLOSIVES AND DRUGS EXEMPT FROM DISCLOSURE; RECORDS RELATING TO THE HEALTH AND SAFETY EFFECTS OF THE SCANNING ARE NOT EXEMPT.

The First Department, partially reversing Supreme Court, determined certain records relating to the NYPD's use of Z-backscatter vans for terrorism-related surveillance were exempt from disclosure. The Z-backscatter technology uses radiation to scan buildings and vehicles for evidence of explosives and drugs. People are exposed to low levels of radiation by the devices. The Appellate Division held that information related to past uses of the vans was exempt from disclosure, but information related to the health and safety effects was not exempt: "NYPD has articulated a 'particularized and specific justification for not disclosing' these records … . NYPD submitted an affidavit of Richard Daddario, NYPD's Deputy Commissioner of Counterterrorism, who averred that the vans are a highly specialized and nonroutine technology used to combat terrorism in New York City. Daddario explained that in light of the ongoing threat of terrorism, releasing information describing the strategies, operational tactics, uses and numbers of the vans would undermine their deterrent effect, hamper NYPD's counterterrorism operations, and increase the likelihood of another terrorist attack. * * * The court . . . properly directed NYPD to disclose tests or reports regarding the radiation dose or other health and safety effects of the vans. Daddario's affidavit does not explain how general health and safety information about the van's radiation could be exploited by terrorists." ***Matter of Grabell v. New York City Police Dept.*, 2016 N.Y. Slip Op. 03685, 1st Dept 5-10-16**

SECOND DEPARTMENT

CIVIL PROCEDURE, EVIDENCE.

EVIDENCE SUBMITTED IN SUPPORT OF MOTION TO DISMISS DID NOT CONSTITUTE DOCUMENTARY EVIDENCE WITHIN THE MEANING OF CPLR 3211(a)(1).

The Second Department determined the evidence submitted by defendant law firm in support of a motion to dismiss the malpractice complaint based on documentary evidence was properly denied. The letters and affirmation did not constitute "documentary evidence" and did not utterly refute plaintiff's allegations: " 'The evidence submitted in support of a [CPLR 3211(a)(1)] motion must be documentary' or the motion must be denied' ... . To qualify as documentary evidence, the evidence 'must be unambiguous and of undisputed authenticity' ... . '[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable,' would qualify as documentary evidence' in the proper case' ... . Affidavits and letters 'were not the types of

documents contemplated by the Legislature when it enacted this provision'... . Here, the letters . . . did not constitute documentary evidence for the purpose of a motion pursuant to CPLR 3211(a)(1) . . . , Similarly, the affirmation of one of [the law firm's] members was not documentary evidence for the purpose of this motion ...". ***Anderson v. Armentano*, 2016 N.Y. Slip Op. 03690, 2nd Dept 5-11-16**

CRIMINAL LAW.

FAILURE TO PROVIDE RACE-NEUTRAL REASON FOR CHALLENGE TO BLACK JUROR REQUIRED REVERSAL.

The Second Department determined the prosecutor's failure to provide an adequate race-neutral reason for a peremptory challenge to a black juror required reversal: "Here, during jury selection, the defendant made an application before the trial court pursuant to *Batson*, arguing that the prosecution was exercising its peremptory challenges in a discriminatory manner against prospective black jurors. The prosecutor proffered an explanation for challenging one of the two jurors at issue, stating that it was 'just our instincts that we don't feel [prospective juror] number 4 would be a suitable juror for this particular trial.' This explanation was inadequate ... . Under the circumstances, the fact that the prosecution, essentially, 'offered no reason at all with respect to [its] challenge of the juror is dispositive of the *Batson* issue' ...". ***People v. Jones*, 2016 N.Y. Slip Op. 03758, 2nd Dept 5-11-16**

EMINENT DOMAIN.

CLAIMANTS DID NOT DEMONSTRATE THE FEASIBILITY OF USE OF THE CONDEMNED LAND FOR HIGH-RISE RESIDENTIAL AS THE HIGHEST AND BEST USE.

The Second Department determined claimants did not demonstrate it was feasible the highest and best use of condemned waterfront property would be high-rise residential. The court explained the law: "The bedrock of eminent domain law is the principle that, when private property is taken for public use, the condemning authority must 'compensate the owner so that he may be put in the same relative position, insofar as this is possible, as if the taking had not occurred' ... . 'The measure of damages must reflect the fair market value of the property in its highest and best use on the date of the taking, regardless of whether the property is being put to such use at the time' ... . Moreover, '[i]t is necessary to show that there is a reasonable possibility that the property's highest and best asserted use could or would have been made within the reasonably near future, and a use which is no more than a speculative or hypothetical arrangement may not be accepted as the basis for an award' ... . '[A] condemnee may not receive an enhanced value for its property where the enhancement is due to the property's inclusion within a redevelopment plan' ... . Thus, for example, property zoned for industrial use 'should be valued in accordance with the industrial zoning designation which would apply if the redevelopment plan did not exist,' for [a] condemnee is only entitled to compensation for what it has lost, not for what the condemnor has gained' ...". ***Matter of Queens W. Dev. Corp. v. Nixbot Realty Assoc.*, 2016 N.Y. Slip Op. 03746, 2nd Dept 5-11-16**

PERSONAL INJUIRY, LABOR LAW-CONSTRUCTION LAW, CONTRACT LAW, FRAUD.

QUESTION OF FACT WHETHER GENERAL RELEASE PROCURED BY FRAUD OR UNDER UNFAIR CIRCUMSTANCES.

The Second Department determined questions of fact whether a general release from liability was procured by fraud precluded summary judgment in favor of the defendant in this Labor Law (fall from scaffold) action: "Here, in support of their motion to dismiss the complaint, the defendants submitted a general release executed by the plaintiff, which, by its terms, barred the instant action against them ... . However, the plaintiff's allegations were nevertheless sufficient to support a possible finding that the defendants procured the release by means of fraud and that the release was signed by the plaintiff 'under circumstances which indicate unfairness' ...". ***Pacheco v. 32-42 55th St. Realty, LLC*, 2016 N.Y. Slip Op. 03727, 2nd Dept 5-11-16**

PERSONAL INJURY, MUNICIPAL LAW.

QUESTION OF FACT WHETHER ABUTTING PROPERTY OWNER VIOLATED THE NYC ADMINISTRATIVE CODE AND THEREBY OWED A DUTY TO PLAINTIFF WHO ALLEGEDLY FELL OVER A CABLE ON THE SIDEWALK.

The Second Department determined defendant abutting property owner did not demonstrate he owed no duty to the trip and fall plaintiff who allegedly fell over a piece of rebar which was on the sidewalk. The court explained the duty of abutting property owners under the New York City code: "[L]ability may be imposed on the abutting landowner when the abutting landowner . . . violated a statute or ordinance imposing liability on the abutting landowner for failing to maintain the sidewalk ... . 'Administrative Code of the City of New York § 7-210, which became effective September 14, 2003, shifted tort liability for injuries arising from a defective sidewalk from the City of New York to the abutting property owner' ... . Administrative Code section 7-210(a) states that '[i]t shall be the duty of the owner of the real property abutting any sidewalk . . . to maintain such sidewalk in an reasonably safe condition.' Administrative Code section 7-210(b) states

that '[f]ailure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to . . . the negligent failure to remove snow, ice, dirt or other material from the sidewalk' ...". ***Metzker v. City of New York*, 2016 N.Y. Slip Op. 03724, 2nd Dept 5-11-16**

THIRD DEPARTMENT

APPEALS, EVIDENCE.

ORDER LIMITING TRIAL EVIDENCE WAS APPEALABLE.

The Third Department determined an order precluding a party from introducing evidence at trial was appealable in this case. However, under the facts, the order was properly granted. With respect to the appealability of the motion in limine, the court wrote: "As a threshold matter, an order ruling on a motion in limine is generally not appealable as of right or by permission 'since an order[] made in advance of trial which merely determined the admissibility of evidence is an unappealable advisory ruling' ... . 'However, an order that limits the scope of issues to be tried, affecting the merits of the controversy or the substantial rights of a party, is appealable' ... . The order appealed from here, rather than 'merely limit[ing] the production of certain evidence as immaterial to damages,' restricted plaintiffs' ability to prove and recover damages . . . and it is, therefore, appealable ...". ***Calabrese Bakeries, Inc. v. Rockland Bakery, Inc.*, 2016 N.Y. Slip Op. 03772, 3rd Dept 5-12-16**

CRIMINAL LAW.

FAILURE TO INSTRUCT SPECTATORS TO REMOVE OR COVER UP T-SHIRTS MEMORIALIZING THE MURDER VICTIM WAS HARMLESS ERROR.

The Third Department determined County Court's failure to address T-shirts memorializing the murder victim worn by trial spectators was error, but the error was harmless: "[W]e find that County Court's failure to instruct the spectators to remove or cover up their T-shirts was error, but the court was attentive to the courtroom environment and interacted with the spectators in an authoritative yet sensitive manner. In addition, there is no evidence that the spectators who wore the T-shirts called attention to themselves during the trial, nor did the photograph or letters 'R.I.P.' convey anything other than remembrance of the victim. Consequently, we conclude that their conduct was not so egregious as to require reversal. We also find that the proof of defendant's guilt was so overwhelming that there was no reasonable possibility that this error might have contributed to his conviction ...". ***People v. Jones*, 2016 N.Y. Slip Op. 03770, 3rd Dept 5-12-16**

DISCIPLINARY HEARINGS (INMATES).

HEARING OFFICER DID NOT MAKE AN ADEQUATE EFFORT TO FIND WITNESSES, NEW HEARING REQUIRED.

The Third Department determined the hearing officer's failure to make an adequate attempt to locate the witnesses petitioner wanted to testify at the hearing required a new hearing: "At the hearing, petitioner requested the testimony of two fellow inmates. He did not know the inmates' names, but identified them by their nicknames and each of the cell blocks in which they were housed. Although the Hearing Officer made a phone call in an effort to locate one of these inmates, he made no effort to locate the other one, stating that petitioner did not provide him with enough information. Although petitioner's description of the requested witnesses was limited, in our view it was sufficiently detailed in that an attempt to locate them would not have been overly burdensome. Accordingly, the Hearing Officer's failure to make a reasonable effort to locate the inmates violated petitioner's right to call witnesses ... . * * * Given that the Hearing Officer articulated a good-faith reason for denying the witnesses and for his lack of effort in locating them, we find that petitioner's regulatory right to call witnesses was violated and not his constitutional right, and remittal for a new hearing is the proper remedy...". ***Matter of Allaway v. Prack*, 2016 N.Y. Slip Op. 03777, 3rd Dept 5-12-16**

DISCIPLINARY HEARINGS (INMATES).

HEARING OFFICER IMPROPERLY LIMITED THE NUMBER OF WITNESSES PETITIONER COULD CALL, NEW HEARING REQUIRED.

The Third Department determined the hearing officer improperly limited the number of witnesses petitioner could call for the hearing. A new hearing was required: "Prior to the hearing, petitioner gave his assistant a list of 13 potential inmate witnesses who might testify. At the hearing, it appears that he wished to have some of these witnesses testify, but the content of their proposed testimony was never ascertained by the Hearing Officer. Instead, the Hearing Officer limited the number of witnesses to three, stating that he was not going to allow redundant testimony. Significantly, however, the Hearing Officer never explained the reason that the testimony would be redundant and this is not clear from the record. Under these circumstances, we find that the denial of the remaining inmate witnesses was error ...". ***Matter of Payton v. Annucci*, 2016 N.Y. Slip Op. 03791, 3rd Dept 5-12-16**

PISTOL PERMITS.

PISTOL PERMIT PROPERLY REVOKED BY FAMILY COURT.

The Third Department determined Family Court properly revoked petitioner's pistol permit: "Here, the evidence included the report of a police investigator who interviewed both petitioner and his former spouse regarding the 2008 domestic dispute. The former spouse recounted that, during a heated dispute over the status of their marriage, petitioner punched several holes in the wall, removed his pistol from a drawer in his bedroom, began to load it and told her that 'he was going to give her something to call the police about.' Contrary to petitioner's claim, respondent was entitled to rely on the hearsay statements contained in the report ... . Although petitioner denied threatening his former spouse and testified that he was merely packing the gun with the rest of his belongings in an effort to leave the marital home, respondent expressly found the former spouse's account to be more credible, and we defer to such credibility determinations ... . Accordingly, we find no abuse of discretion in respondent's determination that petitioner handled his pistol in an irresponsible manner and that revocation of his permit was therefore justified ...". ***Matter of Schmitt v. Connolly*, 2016 N.Y. Slip Op. 03775, 3rd Dept 5-12-6**

REAL PROPERTY.

DISPUTED BOUNDARY PROVEN THROUGH DOCTRINE OF PRACTICAL LOCATION.

The Third Department determined the disputed boundary line was established by the doctrine of practical location: "Under . . . doctrine [of practical location], 'the practical location of a boundary line and an acquiescence of the parties therein for a period of more than the statutory period governing adverse possession is conclusive of the location of the boundary line' ... . Moreover, 'application of the doctrine requires a clear demarcation of a boundary line and proof that there is mutual acquiescence to the boundary by the parties such that it is definitely and equally known, understood and settled' ...". ***Lounsbury v. Yeomans*, 2016 N.Y. Slip Op. 03798, 3rd Dept 5-12-16**

UNEMPLOYMENT INSURANCE.

POSSESSION OF MARIJUANA CONSTITUTED DISQUALIFYING MISCONDUCT.

The Third Department determined claimant's criminal conviction disqualified him from receiving unemployment insurance benefits. Claimant had been a service aide for the developmentally disabled for 25 years and pled guilty to possession of marijuana: "Criminal convictions arising from conduct occurring outside the workplace have been found to constitute disqualifying misconduct where they demonstrate a breach of the standards of behavior to be reasonably expected by an employer in light of the nature of the employment involved ... . Significantly, claimant's job responsibilities included, among other things, dispensing medications to developmentally disabled individuals. Given the environment in which claimant worked, it was reasonable for the employer to expect that claimant would not illegally use or possess controlled substances. Clearly, claimant's criminal conduct posed a risk to the employer's mission and was detrimental to its interests. Therefore, we find that substantial evidence supports the Board's finding that claimant engaged in disqualifying misconduct ...". ***Matter of Hall (Commissioner of Labor)*, 2016 N.Y. Slip Op. 03797, 3rd Dept 5-12-16**

WORKERS' COMPENSATION LAW.

STATUTE REQUIRING TIMELY NOTICE OF THE ACCIDENT DID NOT REQUIRE NOTICE OF ALL THE INJURIES STEMMING FROM THE ACCIDENT.

The Third Department determined the statute requiring notice of an accident did not require notice of all the injuries. Here, the self-insured employer was timely notified of the accident and claimant's knee injury but was not notified of other injuries stemming from the accident until a year later: "Workers' Compensation Law § 18 provides, in relevant part, that written '[n]otice of an injury . . . for which compensation is payable . . . shall be given to the employer within thirty days after the accident causing the injury.' The same provision also provides that the Board may excuse late notice upon certain grounds, including 'that the employer, or his or its agents . . . had knowledge of the accident.' Here, the self-insured employer was provided with notice of the accident and claimant's resulting left knee injury within the statutory 30-day period, but was unaware of claimant's other injuries until nearly a year later when she filed her C-3 claim. The self-insured employer contends that this Court should construe the statutory phrase 'had knowledge of the accident' to mean 'had knowledge of the injury,' and, as a result, conclude that claimant's late notice for the additional injuries is inexcusable pursuant to Workers' Compensation Law § 18. We reject the self-insured employer's interpretation of Workers' Compensation Law § 18, as it contravenes two foundational rules of statutory construction." ***Matter of Logan v. New York City Health & Hosp. Corp.*, 2016 N.Y. Slip Op. 03776, 3rd Dept 5-12-16**

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